MARIE L. CLOONAN
Federal Court Reporter
John Joseph Moakley Courthouse
1 Courthouse Way - Room 5209
Boston, MA 02210-3002

021-32-4017 (617)439-7086

TO:
Robert S. Frank, Jr. Esquire
Choate, Hall & Stewart
53 State Street - Exchange Place
Boston, MA 02109

May 24, 2004

Civil Action No. 04-10353-PBS, Scansoft, Incorporated v. Voice Signal Technology, Hearing before the Honorable Patti B. Saris, held on April 14, 2004.

Transcript

21 pages @$2.06 $43.26

Thank you.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

SCANSOFT, INCORPORATED, Plaintiff	:	Civil Action No. 04-10353-PBS
V.	:	Courtroom No. 13
	:	1 Courthouse Way
VOICE SIGNAL TECHNOLOGY, Defendant	:	Boston, MA 02210-3002
	:	2:30 p.m., Wednesday
	:	April 14, 2004

Scheduling Conference

Before: THE HONORABLE PATTI B. SARIS,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

Bromberg & Sunstein, LLP,
(by Lee Carl Bromberg, Esq. and Lisa M. Fleming, Esq.),
125 Summer Street, Boston, MA 02110-1618,
on behalf of the Plaintiff.

Choate, Hall & Stewart,
(by Robert S. Frank, Jr., Esq. and Paul D. Popeo, Esq.),
53 State Street, Exchange Place, Boston, MA 02109,
on behalf of the Defendant.

Marie L. Cloonan
Official Court Reporter
1 Courthouse Way - Suite 5209
Boston, MA 02210-3002 - (617)439-7086
Mechanical Steno - Transcript by Computer

THE CLERK: The case of Scansoft, Incorporated v. Voice Signal Technology, Incorporated, Civil Action No. 04-10353, will now be heard before this Court.

Will counsel please identify themselves for the record.

MS. FLEMING: Lisa Fleming for the plaintiff Scansoft, with Lee Bromberg.

MR. FRANK: Robert Frank and Paul Popeo for the defendants.

THE COURT: Let me just turn to you. I mean, in a way, I view this as a -- I've read everything -- as a skirmish. I think the defendants have made a decent point, which is you only get what you get after you purchase the assets and the complaint doesn't make it clear.

On the other hand, if I dismiss it, it's without prejudice to them repleading it.

So, let me just ask you this. Are you referring to misappropriation of trade secrets that occurred after the purchase of the assets?

MS. FLEMING: Yes, your Honor, if I may. That is exactly what we're referring to. And, the complaint itself does allege continuing violations post the transfer of the assets.

THE COURT: It just isn't clear. I understand why they were upset. It just regurgitated an earlier complaint.

Why don't you revise it to make it clear?

MS. FLEMING: We can certainly revise it to --

THE COURT: If they do that, what is the challenge? This is a skirmish. Because, even if I grant it, it's going to be without prejudice to them doing that.

MR. FRANK: I actually -- our side is actually counting on the simple principle that such an allegation cannot be made in good faith. That in order to sustain such a claim, it would have to be alleged that a year after the defendants left the employ of Lernout and Hauspie, a dead company, that something that was transferred to Scansoft, was, A, a secret, still, even though there had been thousands of employees who had left the company. B, that that secret had substantial value --

THE COURT: Can I say? That may be true that ultimately they can't prove it out or you could from Rule 11. But, it's strikes me that they're alleging that it -- no one's in disagreement, essentially, that they can't sue for something that wasn't theirs.

And so, are you saying that you have evidence in your possession that there was a misappropriation of trade secrets that occurred after you acquired the intellectual property?

MS. FLEMING: What we have as evidence -- and it is only limited to one press release that is a release put out

by the defendant company Voice Signal, that clearly identifies a product, that has a whole list of functionalities that are very, very similar, strikingly, to two confidential products that -- projects that are owned now by Scansoft.

THE COURT: All right.

Do you have information that the trade secrets were used after you acquired your product and that they were kept confidential, and that sort of thing?

MS. FLEMING: Again, what we know is that the trade secrets were used to develop ELVIS.

THE COURT: Let me say this. I'm not going to resolve this on a Motion to Dismiss. I'm just not going to do it. And, that's why I view this as a skirmish.

I think your point is well taken. They cannot sue for anything that predates your acquisition. If they've got a good faith basis. So, I'm allowing the Motion to Dismiss without prejudice.

If you want to replead it to be very specific, you'll do what you need to do on a substantive Motion to Dismiss. I doubt I'll resolve it on that. Frankly, I don't want -- I have too much to do. I'm swamped. I mean, I will say that. I am swamped with a lot of megacases, patent cases, multi-district litigation cases. Every criminal case I have is going to trial. So, I can't do these little

things piecemeal. I can't.

So, it doesn't -- you have a big patent case that's going to go forward. Right?

There's a patent dispute.

MS. FLEMING: Yes, there is, your Honor, yes.

MR. FRANK: Yes.

THE COURT: So, it's not worth it to me to spend this amount of time duking it out over a Motion to Dismiss.

MR. FRANK: Let me say two things, if I might. And, I understand where this is going.

THE COURT: Yes.

MR. FRANK: What was just described to you is a press release issued prior to their acquisition of these assets and all they say is that the product in question has similar functionality to something that they were working on.

THE COURT: I tell you what. This is what we're going to do. I'm giving you your relief. I'm granting the Motion to Dismiss without prejudice.

You think about whether or not, under Rule 11, and based on the information you have, you have a sufficient basis for repleading it for a violation of your trade secrets that post-dated the acquisition of those trade secrets. I leave it up to you to decide whether you've got it. And, it doesn't have to be right away. Maybe it will

during the course of discovery you figure out what happened.

MS. FLEMING: Well, that is part of the strategy, certainly, is to go forward with discovery and to get some more information. Obviously, when you're dealing with trade secrets, there is information that is kept confidential.

Fortunately, it appears that the defendants have kept it confidential within its company.

THE COURT: Maybe -- you know -- by the way, you probably all don't know this. Do you know I am the Lernout and Hauspie judge?

(Laughter.)

THE COURT: I have written eight opinions about the securities fraud issues having gone on with Lernout and Hauspie.

And, I've got the Dictaphone people in my court and the Dragon people in my court, and the trustees of the trustees in my court. I've got them all. I am looking forward to learning about the intellectual property that spurred on this problem. So, I actually know something about the company and the problems that its had over the years.

You make a decision. I'm allowing your Motion to Dismiss without prejudice.

You decide whether you want to replead and when in good faith you feel you can replead, if at all.

We still have a major patent case to get through. So, let's set up a scheduling conference for it.

MS. FLEMING: Your Honor, if I may, I do just want to be clear with the Court that this complaint is about continuing, continuing and ongoing violations. It's not about the time period that Lernout and Hauspie owned the property. And, I did just want to be clear about that.

THE COURT: Well, then, you'll have to make very clear in your complaint what it is. Because, I do understand. It pretty much was a copy. They have rights, too, and that they weren't resolved through the bankruptcy. They have separate intellectual property rights and you weren't denying that -- I know that -- in your papers.

So, you just have to be really clear in your mind, you've got a good faith basis for alleging misappropriation or misuse of trade secrets that post-dated the acquisition of the intellectual property. If you've got it, plead it. If you want to wait until you have some discovery, do it. Because, there's going to be discovery on the patent case.

MR. FRANK: Let me just, if I may, your Honor, and I don't want to try your patience. Two things.

First, these cases are not to be brought, in my judgment, without an adequate pleading basis so that discovery can be conducted in an effort to find a secret.

THE COURT: There's a patent case. So, there's

going to be discovery on the patent.

MR. FRANK: Absolutely.

THE COURT: So, if they find technologies that they consider to be a breach of the trade secrets, all is fair.

MR. FRANK: If the discovery chasing the patent were to reveal --

THE COURT: That's all I'm talking about.

MR. FRANK: Okay.

THE COURT: So, tell me about this patent. What are the issues? Is there any kind of infringement issue or validity? What are the issues?

MR. FRANK: There is an infringement issue and there is a validity issue and, as discovery proceeds, there may be other issues.

THE COURT: Are there Markman issues, right away? Do we know claim construction?

MR. FRANK: There will be Markman issues.

THE COURT: All right. So, let's do our scheduling conference.

MR. FRANK: Fine.

THE COURT: Why bring you back. Right?

MR. FRANK: I should say, so that nobody is blindsided here, that there may be more patents in play when the pleadings are complete that are in play right now.

THE COURT: Do you have some of your own? Is that

it?

MR. FRANK: Yes.

THE COURT: And, are you cross-claiming -- counterclaiming?

MR. FRANK: I don't want to make that decision categorically. But, I believe that that should be -- it would be a reasonable assumption that there would be more than just the one patent that you see right now.

THE COURT: Well, let me ask you this. When would you want to be amending your pleading so that we can do discovery all at once, rather than piecemeal?

MS. FLEMING: Well, we will be amending.

THE COURT: Oh, you're amending.

MS. FLEMING: And, I will need an answer, obviously.

THE COURT: Oh, you don't have patents of your own that you're asserting against them?

MS. FRANK: No --

MS. FLEMING: They haven't answered the complaint because of the Motion to Dismiss, your Honor.

MR. FRANK: So, actually, what has to happen is a decision has to be made with respect to repleading. If they tell us that they're not going to replead, we'll file an answer within ten days and answer any counterclaim, if any, within ten days after that. If they do replead, we may

be back here on another motion.

THE COURT: No. That's what I'm telling you I'm not going to do. This case has got to go forward.

Now, what are you going to be counterclaiming on?

MR. FRANK: Oh, there may be a patent infringement counterclaim, on which --

THE COURT: That's what I'm asking. So, it's your patent --

MR. FRANK: Yes.

THE COURT: Yes, yes. Okay.

MR. FRANK: That's what I said, I think.

THE COURT: So, that's why -- when would you -- you're going to answer and file a counterclaim. When can you do it? Just tell me.

MR. FRANK: We'll file an answer ten days after we have a complaint to --

THE COURT: No, you've got a complaint. I've knocked out their counts.

MR. FRANK: Oh, okay. I'll file -- we'll file an answer in ten days.

THE COURT: Fine. And a counterclaim?

MR. FRANK: I beg your pardon?

THE COURT: And a counterclaim?

MR. FRANK: If any, yes.

THE COURT: If any. All right. So, that's where

it's at.

MS. FLEMING: And, we will be amending --

THE COURT: It's your decision, when and if to amend. That's your decision. At some point, it gets too late and I say no. But, we're not even close to that point in time.

All right. So, you're going to counterclaim.

Now, how long will you need in discovery?

MR. FRANK: May I ask? It's not for me to ask the questions --

THE COURT: No, sure. Go ahead.

MR. FRANK: -- back to the Court. But, when would you ordinarily reach this case for trial and, if you tell us that, we can work it back from there and come up with a reasonable schedule.

THE COURT: I actually don't do it that way. I usually figure out how long you need on discovery. In dealing with a patent case, I then need to sort of fact discovery and expert discovery and I need -- there's almost always a Motion for Summary Judgment. Almost always.

MR. FRANK: Yes, I understand.

THE COURT: And --

MR. FRANK: I would say fairly arbitrarily six months for discovery.

THE COURT: Do you think that's --

MR. BROMBERG: On our side, your Honor, I think six months for fact discovery, followed by expert witness period and, then, fitting any Markman determination and/or dispositive motions into this schedule.

THE COURT: Will Choate be doing the patent case?

MR. FRANK: Yes.

THE COURT: So, let me just -- so, fact discovery, you want to do the end of January, 2005? Is that too far out?

MS. FLEMING: That's fine, your Honor.

THE COURT: I think it is too far out. So, let's say November 5th, end of fact discovery. Plaintiff's expert designation 12-3. Defendant's expert designation, 1-8. Expert discovery deadline, 2-25. Summary judgment and Markman would be 3-25. Opposition 4-15. And, hearing -- there's almost inevitably a reply and a surreply. So, we'll just put this hearing into sometime in late May?

THE CLERK: May 26th at 2 p.m.

MR. FRANK: Your Honor, I'm assuming that it's your usual practice to have the Markman hearing only after expert reports are submitted, which is implicit in the schedule?

THE COURT: I don't have an inflexible rule. In general, I've been merging summary judgment and Markman because I understand the issues better.

Sometimes counsel are willing to persuade me that

if I just construe one claim that will settle the case -- if that's so, I'd consider it. But, I've increasingly found that even when I do that, it doesn't settle. I don't know what to say. I generally will set a trial date after I resolve the motions for summary judgment.

MR. FRANK: I fully understand the reasoning. And, I'd like to understand how these claim constructions fit with the true issues in the case, which tend to get smoked out on motions for summary judgment.

The counterveiling consideration, and I'm sure you know this, is that if you do it that way, the expert reports have to assume alternate claim constructions --

THE COURT: Yes, they do.

The other way -- I haven't done it -- is I end up having to construe a million claims, only some of which become relevant in the motion for summary judgment.

MR. FRANK: Yeah. Okay.

THE COURT: I've tried both ways and it makes more sense from my point of view to understand why it matters.

MR. FRANK: Yes. I understand.

THE COURT: And, I understand -- occasionally what's happened is I split a baby and I don't accept either side's claim construction, And, they're right, it's sort of a waste of time to have to go back and rebrief for summary judgment. But, usually, it's not a full rebriefing.

MR. FRANK: Let me make one suggestion, if I may.

THE COURT: Yes.

MR. FRANK: And, that is that the parties be required -- the plaintiff, one date and, then, the defendant at a later date, so that they meet each other, to exchange sort of their claim constructions, their proposed claim constructions in advance of the serving of the expert reports, so that we may have two conflicting constructions of the given claim, but at least the expert reports meet each other, rather than having them not meet each other.

THE COURT: That makes some sense. As you probably know, there's a local rule in California that makes you do that within -- in the beginning. I'm told that's only met with some mixed success. But, before the requirement for the experts, do you want to have a -- like a -- oh, do you want to just say a September date in there? Maybe September 13th, exchange claim constructions?

MR. FRANK: Yes.

THE COURT: And, the only reason I'm a little reluctant on that is I found that you all can agree there are a few things you disagree on, and then I find that there's more when I get to summary judgment.

(Laughter.)

THE COURT: But I think that's a very useful suggestion. At least the experts can address what you know

is in conflict and, then, if more comes up, more comes up.

MR. FRANK: Yes.

THE COURT: So, why don't we do a claim construction. I don't even need to see it, I don't -- well, why don't you file with the Court.

MR. FRANK: I think sometime prior to that, we should at least consult with each other to make sure that we understand which claims need -- which claim terms need to be construed.

THE COURT: Yeah. The disputes over claim terms. Maybe you'll file, each, we'll exchange constructions and then file with the Court, you know, claims in dispute.

MR. FRANK: Yes.

THE COURT: Your experts can address that. You'll do that by 9-13. That's a very excellent suggestion.

Mediation, is there a chance of cross-licensing? Do you all cross-license to each other?

MR. FRANK: Very unlikely, I think. I mean, I never say no. But, this is very unlikely.

THE COURT: Does your company license at all?

MR. FRANK: Does ours?

THE COURT: Yes.

MR. FRANK: It has not in the past.

THE COURT: Does your company license?

MR. BROMBERG: Well, we do, under appropriate

circumstances. But, in this one, we don't know what the defendants are going to throw against us. They say they may or may not assert a counterclaim. So, we're not sure what the dimensions of the dispute are at this point.

THE COURT: Well, I won't press right now. I think it's just really too early on it.

But, at some point, how do you want to handle mediation? When do you want to go to some sort of a mediator to talk about it?

MR. FRANK: Let me say this. It would seem to me that there's a threshold question, which is, after all the parts are visible, is one side or the other willing to license the other on some terms?

If the answer to that is no, then, it doesn't strike me that there's likely to be room for mediation here. It's likely that -- if the answer to that is yes, in principle, on some term, then, probably it makes sense to mediate and --

THE COURT: I'm not going to press that right now. But, I sure will when we hit the summary judgment and Markman point.

MR. FRANK: Sure.

THE COURT: And, the other thing I will say is, I've done one of these with Mr. Bromberg before. I don't know that I've done one with you. I find it really useful

to actually have a tutorial on the technology. You all assume a lot more knowledge than I usually have about the science.

And, I just had a couple where, literally, I spent the afternoon on the Internet trying to find what just the basic terms meant, with my medical dictionary on my lap, and prints to the Internet to find out -- you know, people -- I have certain lay understandings of terms, but that's not good enough for these cases. And so, sometimes it's helpful to put a live witness on. Sometimes you can do it through a video. Sometimes just, if it's simple enough, I suppose you could just have an affidavit, but something.

MR. FRANK: Let me, if I may, because I've done this in in a couple of other cases. This is a case where I think the technology is accessible enough that Mr. Bromberg and I could present it to you, the core facts. I mean the core technological facts are relatively accessible and relatively -- and I doubt that as to the core facts that there's very much dispute as to how these things work.

THE COURT: But, I sort of like to understand the science in my gut. So, for example, the one that I did understand, I understood curling iron --

(Laughter.)

THE COURT: -- and I understood the Gillette v. Schick. I knew what three versus four razorblades meant.

So, I was okay with that.

But, then, for example, I had Pause v. TiVo. And so, you would think, well, that would be pretty straightforward, you know, how you go about pausing and understanding the technology, the computer's logic for pausing and how they went about doing that, and whether they were the same. But, I actually found that fairly hard.

MR. FRANK: Okay.

THE COURT: So, I don't know what the technology is. But, you shouldn't -- is this computer science? What field are we in?

MR. FRANK: Voice recognition technology.

THE COURT: Yes. But, what is that? Is it computer science?

MR. FRANK: It's software.

THE COURT: So, it's not -- I've never had computer science. I think someday I'll take a sabbatical and go back and take it. But, it's not -- the computer logic is not something I necessarily know. Maybe you all do. Do I need to know it?

MR. FRANK: I doubt that you need to know it for their patent -- for the patent that's instituted right now. I, frankly, have not thought through the question, whether you would need to know it. Because, their patent speaks of

certain functionalities as distinguished from how the software works.

MR. BROMBERG: Our patent basically relates to a system for using a cell phone to give it commands by voice.

THE COURT: All right.

But, I have no -- I notice that the guys who are involved here all have Ph.D.s in physics, et cetera.

MR. BROMBERG: That's true.

THE COURT: I won't understand that.

MR. BROMBERG: Yeah. I think I would agree with Mr. Frank that it is more accessible -- the technology here is more accessible than it is in some other cases. But, I also believe that it makes very good sense for us to give a technology tutorial with presentations by counsel and/or possibly an expert witness.

THE COURT: You know, I had the Bose case and that was an interesting one, with the speaker phones. And, it was very useful, just -- just a review. I have to admit -- I'll probably get myself reversed by admitting that -- I went back to my son's AP Physics book just to review basic principles of sound waves. It's useful to -- You know, I've taken it. It's just useful to remind me of the basic scientific principles or whatever field this is, computer science, that explains how it works.

MR. FRANK: We'll get it to you.

THE COURT: If you want to just hand me a physics textbook or computer and let me read it, I'll do that. If you want to put someone on the stand, I'll do that. If you think an affidavit will do that, I'll do it. But, otherwise, I'm sitting there -- you don't want me surfing the Web trying to figure out what the thing means.

MR. FRANK: I take it that you'd like this sufficiently in advance of the summary judgment and Markman stuff so that you could, on the one hand, get it in your head, at that time. And, on the other hand --

THE COURT: Yes.

MR. FRANK: -- it's not so far in advance that it's lost.

THE COURT: Right. I'll watch it. I agree. It's not as hard as the cloning cases I've had, for sure. That that bioscience stuff is a killer.

But, still, it's very useful for me to just understand the technology, to get it in my gut, so I feel as if I'm going with it. I mean, I don't always need to have it if it's an on-sale bar kind of case or something like that.

What are we talking about? What's the issue, validity? What is it?

MR. FRANK: There are infringement and there are validity issues.

And, I think Mr. Bromberg and I are saying about the same thing to you. We will present this to you --

THE COURT: Okay.

MR. FRANK: -- in a way that you'll be able to understand it. You might leave to us, in the first instance, what the methodology and presentation is that will make it most accessible to you.

THE COURT: Perfect.

MR. FRANK: If we disagree, we --

THE COURT: You're both experienced. That's fine.

MR. BROMBERG: Right.

And, I think there's probably going to be a lot of agreement about the basic principles in the technology and, then, that will help us to define for the Court where the areas of disagreement are that relate to the particular patent issues. I think that's right.

So, is anyone planning on bringing anyone in from Lernout and Hauspie?

I'd love to meet them.

(Laughter.)

MR. FRANK: I believe many of them are still unable to travel.

(Laughter.)

THE COURT: Okay. I'll see you later. Bye-bye.

(Whereupon the hearing was concluded.)

CERTIFICATE

I, Marie L. Cloonan, Official Reporter of the United States District Court, do hereby certify that the foregoing transcript, from Page 1 to Page 21, constitutes to the best of my skill and ability a true and accurate transcription of my stenotype notes taken in the matter of Civil Action No. 04-10353, Scansoft, Incorporated vs. Voice Signal Technology.

Marie L. Cloonan